BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CODY RIDDLE	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,051,482
PRICE GREGORY PIPELINE	)	& 1,051,483
Respondent	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
and OLD REPUBLIC INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and its insurance carrier New Hampshire Insurance Company (New Hampshire) and respondent and its insurance carrier Old Republic Insurance Company (Old Republic) appeal the January 25, 2011, Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was awarded medical care as may be reasonably necessary to relieve the effects of claimant's accidental injury, including the back surgery that has been recommended by Frank Tomecek, M.D., with Dr. Tomecek as the authorized treating physician. Claimant was also awarded temporary total disability compensation (TTD) from October 27, 2010, until claimant is released to return to work, has been offered accommodated work within his temporary restrictions, has attained maximum medical improvement (MMI) or until further order of the Court.

Claimant appeared by his attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier New Hampshire (Docket No. 1,051,482) appeared by their attorney, John David Jurcyk of Roeland Park, Kansas. Respondent and its insurance carrier Old Republic (Docket No. 1,051,483) appeared by their attorney, Brian J. Fowler of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held August 31, 2010, with attachments; the transcript of Preliminary Hearing held January 12, 2011, with attachments; and the documents filed of record in this matter.

ISSUES

Docket No. 1,051,482

1. Did claimant provide respondent with timely written claim for the accident which occurred on July 3, 2009? The ALJ, in the Preliminary Order of September 2, 2010, held that claimant had submitted timely written claim for the accident on July 3, 2009. No appeal was taken from that Order. Respondent again raised the issue to the ALJ at the January 12, 2011, preliminary hearing. However, the Preliminary Hearing Order of January 25, 2011, fails to mention the issue dealing with timely written claim. However, as claimant was awarded benefits jointly and severally against both insurance companies, it can be inferred that the ALJ reaffirmed the earlier determination regarding timely written claim.

Docket No. 1,051,483

2. Did claimant suffer personal injury by accident to his low back from the accident occurring on approximately June 22, 2010? Respondent contends that the medical information in this matter refutes claimant's allegations that his low back problems were aggravated by the injury to his right knee on June 22, 2010. Claimant counters with his testimony that his low back symptoms were made worse by the incident when he stepped into a hole and injured his right knee.

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3. Did the ALJ exceed her jurisdiction by ordering both insurance companies to pay for the medical treatment for claimant's low back, with payments to be made jointly and severally? The Order includes the TTD and medical expenses; mileage and per diem to see Dr. Tomecek; and Dr. George G. Fluter's unauthorized bill of $450.00. Both insurance companies argue that claimant's low back problems are not the result of the accidents which occurred during their respective periods of coverage.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Hearing Order should be affirmed.

Claimant was employed by respondent as a manual laborer, working on a project in Hiawatha, Kansas, on July 3, 2009. On that date, claimant was working on a skid truck, helping load and unload the skids. While claimant was standing on the top of the truck, the truck slid off a bridge, forcing claimant to jump from the truck. When claimant landed, he felt low back pain. Claimant reported the accident and received medical treatment at

the Hiawatha Community Hospital Family Practice Clinic on July 6, 2009. Claimant was diagnosed with a lumbar strain with left radiculopathy and referred for an MRI. Claimant was taken off work and prescribed Lortab for the pain. The July 9, 2009, MRI identified minimal degenerative changes at L5-S1 with mild to moderate left and right neural foraminal stenosis. Claimant was then released to full duty effective July 9, 2009.

Claimant filled several prescriptions from Kex Rx in Hiawatha, Kansas, on July 3 and July 6, 2009. The prescriptions were paid partially by claimant's union insurance and partially by claimant. The prescriptions were then taken to respondent, where claimant presented them to Hugh Morris, respondent's "safety guy", wanting reimbursement.[1] Mr. Morris took one receipt but then returned it to claimant and refused the rest, saying that claimant had already paid for them. Mr. Morris stated that respondent would make it up to claimant at some point. When asked why he presented the prescription receipts to Mr. Morris, claimant stated, "Well, I just thought it was the right thing to do since seeing that it happened on the - - on the clock."[2]

Claimant sought medical treatment on his own with Rick L. Robbins, D.O., at the Sequoyah Memorial Hospital in Sallisaw, Oklahoma, on December 14, 2009. At that time, Dr. Robbins determined that claimant needed a referral to a neurosurgeon. An appointment was made with neurological surgeon Frank Tomecek, M.D., at the Oklahoma Spine & Brain Institute, on January 6, 2010. There is no indication that claimant attended that appointment.

Claimant did not return to work for respondent at that time. He, instead, went to work for another company for a period of time, through the union. Claimant did work for respondent at a different branch of the company for a short period of time in August 2009 and then returned to work for respondent on a project in Junction City, Kansas, in April or May 2010. While at the Junction City job, claimant worked tie-ins, removing safety fence and pulling out t-posts. Then, on approximately June 22, 2010, claimant stepped back into an approximate three-foot hole, twisting his right knee. Claimant testified that he also suffered additional pain in his low back, with the back symptoms being different since he stepped into the hole. However, his initial evaluation at Occupational Health Services on June 28, 2010, mentions only his right knee. Claimant was then released to activities as tolerated. The "Pain Assessment Tool" form completed by claimant on June 28, 2010, while at Occupational Health Services, identifies only right knee pain. The section of the form requesting "Workman's Compensation Injuries" information identifies a date of "8-09"

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[1] P.H. Trans. (Aug. 31, 2010) at 22-23.

[2] P.H. Trans. (Aug. 31, 2010) at 24.

and "low back pain-not resolved".[3] When claimant returned to respondent with injury information, he was fired. He was injured on Monday and fired on Tuesday.

The matter proceeded to preliminary hearing on August 31, 2010, with claimant requesting additional medical treatment for the low back pain in Docket No. 1,051,483 and in Docket No. 1,051,482. The Preliminary Hearing Order of the ALJ, dated September 2, 2010, denied medical treatment for the low back in Docket No. 1,051,483 after the ALJ determined that the injury in that claim involved only the right knee. The Preliminary Hearing Order in Docket No. 1,051,482, also dated September 2, 2010, granted medical treatment for the low back, with respondent to name three qualified physicians from which claimant was to choose the authorized treating physician. The three physicians were to be located in West Virginia, near where claimant was living at that time. With regard to the issue of timely written claim, the Preliminary Hearing Order in Docket No. 1,051,482 states:

> In this case, respondent sent Claimant for medical care. Since claimant has not been billed for these services, then Respondent must have provided or paid for it. It is concluded that Respondent has received timely written claim.[4]

Claimant testified that he worked for another company, identified as Extreme Drilling, at some point after his termination from respondent. The exact dates of his employment with Extreme Drilling are not clear in this record. Claimant worked in both Pennsylvania and West Virginia, performing brush cleanup for Extreme Drilling. This required that claimant walk several miles per day while cutting and stacking brush. This was required in order for Extreme Drilling to have clear space to land helicopters and bring in drilling equipment. Claimant worked 40-hour weeks for Extreme Drilling. The job with Extreme Drilling caused his low back to hurt more. Claimant worked this job until approximately three weeks before his first appointment with Dr. Tomecek on October 27, 2010.

Claimant presented to Dr. Tomecek with low back pain and bilateral leg pain at the October 27, 2010, examination. The history provided to Dr. Tomecek included the injury on July 3, 2009. Dr. Tomecek reviewed the MRI scan from July 9, 2009, indicating degeneration and a damaged disk at L5-S1. Claimant discussed the injury to his knee in June of 2010. The doctor was given no indication that the June 22, 2010, accident had any effect on claimant's back. Understandably, Dr. Tomecek determined that the July 3, 2009, accident was the cause of claimant's ongoing back complaints. The impression by Dr. Tomecek was that the right knee improved and the low back needed a repeat MRI. However, claimant did report increased right leg pain after the second injury. Claimant was limited to 25 pounds lifting and 50 pounds pushing or pulling. Claimant was not to crawl

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[3] P.H. Trans. (Aug. 31, 2010), Cl. Ex. 1.

[4] Preliminary Hearing Order (Docket No. 1,051,482) dated September 2, 2010, at 3.

or climb and was to do no extreme bending. The diagnosis was a degenerative and damaged L5-S1 disk.

Claimant returned to Dr. Tomecek on December 8, 2010, after the repeat MRI was performed. Dr. Tomecek again diagnosed significant degenerative changes at L5-S1 with foraminal encroachment due to disk bulging. Claimant had been in pain, by history, since the July 3, 2009, accident. An anterior diskectomy at L5-S1, with the insertion of an artificial disk, was recommended.

At the conclusion of the January 12, 2011, preliminary hearing, it was agreed that the record would remain open for the purpose of obtaining another report from Dr. Tomecek. The requested report was provided to the ALJ and has been referred to as Exhibit 4 from the January 12, 2011, preliminary hearing. The doctor was requested to determine an apportionment between the July 3, 2009, accident and the June 22, 2010, accident and the effect each had on claimant's ongoing low back problems. In his report of January 11, 2011, Dr. Tomecek opined that claimant's low back problems and the injuries to his L5-S1 disk were caused 70 percent from the original July 3, 2009, accident and 30 percent from the second accident on June 22, 2010. The ALJ, after considering Dr. Tomecek's report, determined that the liability for claimant's low back surgery should be assessed jointly and severally between the two insurance companies.

PRINCIPLES OF LAW AND ANALYSIS

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[5]

Respondent and New Hampshire contend that claimant failed to provide timely written claim for the accident on July 3, 2009. The Order of the ALJ appears to determine timely written claim by conjecture and supposition due to the fact that claimant was sent for medical care and not billed for the services. Therefore, the ALJ surmised that respondent had paid for the medical treatment and written claim was, thus, timely. The logic of this decision escapes this Board Member. The statute requires a writing. It must further be shown that the writing, provided by or on claimant's behalf, was presented with the intent to claim workers compensation benefits. The ALJ's analysis displays neither writing nor intent. However, during the August 31, 2010, preliminary hearing, claimant

[5] K.S.A. 44-520a(a).

testified to having paid for certain prescriptions. Those prescription receipts were then presented to claimant's safety director, Hugh Morris. Claimant testified that his intention in presenting those prescription receipts was to obtain reimbursement for the cost as he had suffered the accident at work and "it was the right thing to do since seeing that it happened on the - - on the clock".[6] This shows both a writing and an intent to claim workers compensation benefits all well within the 200-day statutory limit. The decision by the ALJ that claimant provided timely written claim for the accident on July 3, 2009, is affirmed, although on other grounds.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[7]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[8]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[9]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[10]

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[6] P.H. Trans. (Aug. 31, 2010) at 24.

[7] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[8] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[9] K.S.A. 2009 Supp. 44-501(a).

[10] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

The ALJ determined that both insurance companies shared the responsibility for the proposed surgery for claimant's low back. This Board Member agrees with that decision. Dr. Tomecek found the initial accident to be responsible for 70 percent of claimant's low back injury, with the June 22, 2010, accident being responsible for the remaining 30 percent. The ALJ then used this medical opinion to allow for joint and several liability between the insurance companies. Although the Order identifies the liability between the "Respondents", the obvious intent was for the insurance companies to share the responsibility. Additionally, the result is an expedited road to surgery for claimant.

Both insurance companies object to the liability being assessed jointly and severally. However, that issue has been addressed numerous times both by the Board and by the appellate courts. The Kansas Court of Appeals, in *Tull*[11], held that the Board did not err in holding all insurance carriers jointly and severally liable for benefits when the coverage disputes among those carriers actually delayed the prompt diagnosis and treatment of the injured worker due to the motivation to shift liability from one carrier to another. The Kansas Supreme Court, in its recent decision in *Mitchell*[12] citing the *Tull* opinion, found that where degrees of liability between more than one employer and/or insurance company are disputed, the Board's decision to assess joint and several liability was appropriate. The Court held that the degrees of liability between employers/carriers were not to be decided in workers compensation proceedings. These matters should be decided in separate proceedings between the carriers outside the Board's jurisdiction.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The Preliminary Hearing Order of January 25, 2011, is affirmed and claimant is granted medical treatment for his low back injuries, with Frank Tomecek, M.D., as the authorized treating physician for treatment, up to and including surgery. The assessment of joint and several liability against the insurance companies is affirmed.

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[11] *Tull v. Atchison Leather Products, Inc.*, 37 Kan. App. 2d 87, 150 P.3d 316 (2007).

[12] *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 239 P.3d 51 (2010).

[13] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated January 25, 2011, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2011.

HONORABLE GARY M. KORTE

c: Joseph Seiwert, Attorney for Claimant
John David Jurcyk, Attorney for Respondent and its Insurance Carrier New Hampshire Insurance Company
Brian J. Fowler, Attorney for Respondent and its Insurance Carrier Old Republic Insurance Company
Rebecca Sanders, Administrative Law Judge